IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1420 OF 2006

M/s. Padmavati Traders Pusegaon ... Petitioner.

V/s.

M/s. Jaykumar Fulchand Fade & Company
& Anr. ... Respondents.

Mr.Balasaheb Deshmukh, for the Petitioner.

Mr.A.S. Shitole, A.P.P. for the State.

CORAM : A.S. OKA, J.
DATE : 01ST SEPTEMBER, 2006.

P.C. :

1. Submissions of the Advocates appearing for the parties were heard on the last date.

2. The Petitioner is the accused in a complaint filed by the first Respondent under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the said Act). The learned Judicial Magistrate, First Class, Malshiras by Judgement and Order dated 14th February 2006 convicted the Petitioner. The Petitioner (Dharmendra Chandrakant Shah) was sentenced to suffer simple imprisonment for 3 months and to pay fine of Rs.2,000/-. In default he was directed to suffer simple imprisonment for 22 days. The Petitioner was directed to pay a sum of Rs.1,60,975/- being the compensation to the first Respondent. An Appeal was preferred by the Petitioner before the Sessions Court. The Appeal was admitted. In the Appeal, an application was filed under Section 389(1) of the Code of Criminal Procedure, 1973. By the impugned

order dated 14th March 2006, the said application was disposed of by directing that substantive sentence of imprisonment will remain suspended till the decision of the Appeal. However, the Petitioner was directed to deposit 50% of the amount of compensation within one month from the date of the order.

3. The learned Advocate for the Petitioner has placed on record a copy of the Judgment and Order dated 14th February 2006 passed by the learned Magistrate. He submitted that the impugned Judgment and Order is absolutely perverse. He submitted that no evidence was led by the first respondent to prove the ingredients of the offences under Section 138 of the said Act. He submitted that absolutely no evidence was led to show that the Petitioner - Dharmendra Chandrakant Shah had any concern with M/s. Padmawati Traders. He submitted that defence witness No.1 Shri Ravindra stated that in fact he is the proprietor of M/s. Padmavati Traders. He submitted that in view of the evidence of the defence witness No.1, the case should have been resulted in acquittal. He submitted that direction to deposit 50% of the compensation amount is unjust and in view of the said direction, the remedy of the Petitioner to prosecute statutory Appeal will be completely defeated as he is unable to pay the amount. He submitted that this was an exceptional case which required the Appellate Court to pass order under Section 389(1) of the suspension of

sentence without deposit of any amount towards compensation. The learned Advocate for the first Respondent has supported the impugned order.

4. It will be necessary to refer the decision of this Court in the case of M.D. Kale V/s. Capt. Atul & Ors.(2006 ALL MR (Cri) 544) In paragraph No.9 of the said decision, this Court has held thus :-

> 9. What has been held by the Apex Court is that while suspending the sentence for the offence under Section 138 of the said Act of 1881, it is advisable that the Court imposes a condition that the fine amount is remitted in Court within certain period. The Apex Court observed that if the fine amount is heavy, the Court can direct at least a portion thereof to be remitted, as the convicted person wants the sentence to be suspended during the pendency of the Appeal. The Apex Court was dealing with a case of an offence under Section 138 of the said Act of 1881. The law laid down by the Apex Court will naturally apply also to a case where compensation has been ordered to be paid. Thus, when there is a conviction under Section 138 of the said Act of 1881, while suspending substantive sentence, it is advisable that the Appellate Court imposes a condition of deposit of the compenstion amount keeping in mind the object of Section 138 of the said Code. When the amount of compensation is heavy, the Court can direct deposit of a reasonable amount. Only in exceptional cases, the Appellate Court can grant interim protecion without requiring deposit of compensation amount."

5. It must be noted here that in the present case the compensation which is ordered to be paid by the learned Magistrate is equivalent to the cheque amount. The

Sessions Court has directed to deposit only 50% of cheque amount. Under Section 138 of the said Act, there is a power vesting in the Trial Court to order payment of fine which is equivalent to twice amount of the cheque. What has been observed by this Court in the case of M.D. Kale (Supra) is that while suspending the substantive sentence under Section 138 of the said Act, it is advisable that the Appellate Court imposes a condition of deposit of compensation amount keeping in mind the object of Section 138 of the said Act. This Court observed that when the amount of compensation is heavy, the Appellate Court can direct deposit of a reasonable amount and only in exceptional cases, the Appellate Court can grant interim protection without requiring deposit compensation amount.

6. Perusal of the Judgment of the trial Court shows that DW1 Mahendra entered in the witness box and claimed to be proprietor of M/s. Padmavati Traders. The Trial Court has noted that DW1 has not stated that he has taken articles from the first Respondent complainant on behalf of M/s. Padmavati Traders. The trial Court has also noted that DW1 was the real brother of the said accused Dharmendra Chandrakant shah and he did not produce any documentary evidence to substantiate that he was the Proprietor of M/s. Padmavati Traders. The trial Court has observed that his evidence is not worthy of credence. I am not going into the correctness of the said findings as the substantive appeal of the Petitioner is still

pending. it is pertinent to note that no such defence was raised by the Petitioner by sending reply to the notice of demand issued by the first Respondent.

7. Considering the facts and circumstances of the case, the direction issued to deposit 50% of the compensation amount appears to be legal and proper and no interference is called for in a petition under Article 227 of the Constitution of India.

8. Writ Petition is rejected. At this stage the learned Advocate submitted that it is impossible for the Applicant to collect the amount in near future due to recent flood conditions in the area. Therefore, time of 4 months is granted from today to the Petitioner to deposit the 50% of compensation amount. The observations which are made in this order are for a limited purposes of considering the merits of the Writ Petition and the pending Appeal will be decided uninfluenced by the said observations.

JUDGE